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JAMES H. McKENNEY,
Clerk

No. [redacted].134

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1905.

In the Matter of the Petition of the Erie Railroad Company for a Writ of Certiorari Directed to the Circuit Court of Appeals for the Seventh Circuit in the Case of the Erie Railroad Company v. the Propeller Conemaugh, Erie & Western Transportation Company, Claimant.

PETITION.

C. E. KREMER,
W. O. JOHNSON,
Proctors for Petitioner.

GEO. HORNSTEIN CO., PRINTERS, CHICAGO

IN THE

Supreme Court of the United States

In the matter of the petition of the Erie Railroad Company for a writ of certiorari directed to the Circuit Court of Appeals for the Seventh Circuit, to bring before the Supreme Court the case of the Erie Railroad Company against the Propeller Conemaugh, Erie & Western Transportation Company, Claimant.

PETITION.

To the Honorable Judges of the Supreme Court of the United States:

The petitioner respectfully shows to this court:

First—That your petitioner is a corporation and on the 30th day of June, 1896, it merged the Union Steamboat Company in with it by virtue of the laws of New York, and thereby acquired and became possessed of all the estate, property, rights, privileges and franchises of the said Union Steamboat Company in substantially the same manner as the same were held by the latter, and by virtue of such merger it became entitled to collect and claim all debts and claims due the said Union Steamboat Company from any person or party.

Second—That this case grows out of a collision which occurred on the 21st day of October, 1891, between the Propeller New York, then owned by the Union Steamboat

Company, and the Propeller Conemaugh, then, as now, owned by the Erie & Western Transportation Company.

Third—That on the 11th day of November, 1891, the Erie & Western Transportation Company as owner of the Propeller Conemaugh, and as trustee and bailee of her cargo, filed a libel in the District Court of the United States for the Eastern District of Michigan, to recover the sum of $70,000 for damages sustained by the Propeller Conemaugh and her cargo by reason of said collision.

Fourth—The Union Steamboat Company, as the owner of the Propeller New York, filed its answer to said libel, denying all liability for the collision, but claiming that the damage to the New York by reason of the collision, amounted to $3,000.

Fifth—A trial was had in the District Court and the court held both propellers at fault.

The New York, 53 Fed. Rep., 553.

Sixth—This decision was, on petition for re-hearing, reversed and the New York was held solely at fault.

Seventh—That thereupon the following insurance companies filed their petitions and intervened in said cause, claiming damages to the cargo of the Conemaugh, which they had insured in the following amounts:

British & Foreign Marine Insurance Co. (Ltd.)	$ 2,421.84
Insurance Company of North America	7,950.09
Union Marine Insurance Company	8,553.06
Marine Insurance Company	916.57
	$19,841.56

Eighth—To all of the petitions of the above intervenors the Union Steamboat filed its answer, denying all liability

for the collision, and alleging that the fault of the same rested solely upon the Conemaugh.

Ninth—The owner of the New York then prayed an appeal to the Circuit Court of Appeals for the Sixth Circuit and this court reversed the decision of the District Court and held the Conemaugh solely at fault for the collision.

The New York, 87 Fed. Rep., 819.

The petition for a re-hearing was denied.

82 Fed. Rep., 814.

Tenth—A petition for a writ of certiorari was then filed and allowed, and this court held both the New York and Conemaugh at fault for the collision.

The New York, 175 U. S., 187.

Eleventh—In obedience to the mandate issued after this decision the District Court entered a decree which held the New York liable *for all of the cargo damage* and one-half of the damage sustained by the Conemaugh.

Twelfth—A petition was then filed by the owner of the New York, in this court, praying for a writ of mandamus, to issue to the judge of the District Court, to show cause why he should not obey the mandate of the Supreme Court and enter a decree in conformity with its terms. An order to show cause issued and after a hearing this court denied the writ and held that if the owner of the Conemaugh felt itself aggrieved, the remedy was by appeal and not by writ of mandamus.

Ex parte Union Steamboat Co., 178 U. S., 317.

Thirteenth—Thereupon an appeal was prayed from the decision of the District Court in entering the decree above referred to, and a motion was made by the appellees to dismiss the appeal, which was denied.

The New York, 104 Fed. Rep., 561.

Fourteenth—Thereupon the case came up for a hearing on the merits and the decision of the District Court was affirmed.

The New York, 108 Fed. Rep., 102.

Fifteenth—Thereupon a petition for a *writ of certiorari* was filed in this court. This was granted, and the case came up for a hearing, and in its decision this court affirmed the decision of the Circuit Court of Appeals.

U. S. Co. v. *E. & W. Trans. Co.*, 189 U. S., 363.

Sixteenth—The court thereupon issued its mandate and the petitioner was compelled to pay, and did pay, the decree in which the owner of the New York was compelled to pay *all of the* cargo damage.

Seventeenth—Thereupon this petitioner filed its original libel in the United States District Court at Chicago, against the Propeller Conemaugh to recover the sum of $19,734.61, a moiety of the damages paid on account of the cargo of the Conemaugh, and, which it alleged, should have been borne by the Conemaugh, being one-half of the damages arising out of the collision.

A hearing was had in the District Court and on the 24th day of August, 1904, the court awarded the libelant the sum of $28,815, being the amount of the aforesaid claim and interest thereon.

Eighteenth—An appeal was taken and hearing had in the United States Circuit Court of Appeals for the Sixth Circuit, and this court reversed the decision of the District Court and held that the libel should be dismissed, because the questions to be determined in this case were *res adjudicata* in a court of admiralty by reason of the decisions of this court.

Nineteenth—The pleadings in the District Court were

the libel, answer, and agreed state of facts. Petitioner alleges that the Court of Appeals erred as follows:

1st. That the Circuit Court of Appeals erred in holding, as follows:

(5) "That division of cargo damage was not a right arising *ipso jure* out of the fact of contributory fault on the part of the Conemaugh; and without issue raised thereupon 'of liability of the Conemaugh to her cargo underwriters,' it could not be summarily assumed that because she was found in fault, and liable to the New York for one-half of her damages, she is also liable to the underwriters on her cargo and thus foreclosing defense under the 'special stipulations in her bills of lading,' which are asserted on behalf of the Conemaugh as written therein 'to set up against the claims of underwriters.' * * *

"We are of opinion that adjudication leaves no issue open in the admiralty, between these parties, arising out of the collision; that jurisdiction therein cannot be exercised to enforce equalization of the burdens imposed upon one and the other party in the former decree, in contravention of its express terms." Thereby misconstruing the opinion of this court in *New York*, 178 U. S., 317.

The concluding words of which are as follows:

"But no question of recouping one-half of such damages to the cargo from the moiety of damages awarded the Conemaugh was made by counsel or passed upon by this court. It is now insisted that under the cases of *The Chattahooche*, 173 U. S., 540; 43 L. Ed., 801; 19 Sup. Ct. Rep., 491; and *The Albert Dumois*, 177 U. S., 240; 20 Sup. Ct. Rep., 595; 44 L. Ed.; this should have been done. This may be so; but it is an entirely new question, *quite unaffected by the case of the New York*, and if the court erred in refusing to allow such recoupment, the remedy is by appeal, and not by mandamus."

2d. The court erred in holding as follows:

> "Equal division as well of this cargo damage was strenuously sought on behalf of the New York in the final hearing before the trial court, in both reviewing tribunals upon the same argument and citations which are urged upon this appeal, but such relief was denied. Like contention was renewed here, for independent relief, upon averment that the cargo damage was thus imposed for want of pleading in the case, setting up the claim by way of recoupment. Be that as it may, the fact remains that the decree passed, touching all interests with all damages, apportioned as stated. In other words, the respective rights and liabilities of the parties arising out of the collision were thus adjudicated in admiralty, with all parties before the court and all issues heard as raised by them respectively."

Thereby misconstruing the opinion of this court in 189 U. S. 366, which is as follows:

> "The decree against it, the New York, now seeks to shift in part to the owners of the Conemaugh; indeed, not to shift it, but virtually vacate it and put the claims of the cargo owners into controversy with the Conemaugh. This, we think, should not be done. The cargo owner's judgments were affirmed by this court, as we have seen, and they are none the less entitled to them under the circumstances of this record, although as to some of them they were represented by the Conemaugh. The New York having been in fault, was responsible for the cargo, and if, as between her and the Conemaugh, she have a claim for recoupment, the way is open to recover it. We think that the District Court rightly construed our mandate."

Thereby also misconstruing the opinion of U. S. Circuit Court of Appeals in 108 Fed. Rep., 47, which is as follows:

> "The right of setoff or counter claim or recoupment being in no way presented by any pleading in this

case, was not so involved in the nature of the decree rendered as to make it error if the matter was passed *sub silentio*. It was not a defense which the appellant was obliged to then present. The mere fact that there are cross demands will not operate as an estoppel, if, in fact, the cross demand was not presented and adjudicated."

And again on page 107 the courts say:

"The appellants, not being obliged to assert their cross demand or claim for contribution by way of recoupment in this cause, did not do so. This leaves them free to assert their claim for contribution in an independent proceeding against the Conemaugh. No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied."

3d. In holding that the libelant has had its day in court, and has been heard to ask the contribution now demanded in the libel, and that the trial court, the Court of Appeals, and this court has denied such right, and that therefore no independent proceeding can be brought in admiralty to recover contribution, all of which is contrary to the fact as it appears from the decisions of the Court of Appeals and this court, as found in the opinions reported in the cases: 108 Fed. Rep., 47; 178 U. S., 317, and 189 U. S., 363.

4th. Petitioner further alleges that this court, having held that the right of contribution by way of recoupment had not been prayed for by separate pleadings, therefore the owners of the New York could not be heard upon this question, and that the question of whether there should be contribution or not between the New York and Conemaugh as to the cargo damage was not passed upon by it, and was therefore still open and undetermined, and could therefore be made the subject of a separate suit either in admiralty or equity.

5th. That the decision of the Court of Appeals deprives the libelant of its right to recover contribution in a case of collision in which both the New York and Conemaugh have been held at fault, and under the law and practice in admiralty each should bear and pay one-half of the total damages, when such right is not barred or the amount of recovery reduced by any contract or statute or limitations.

That the decision of the Court of Appeals is contrary to law, as petitioner is informed, and deprives the libelant of its day in court, and its right to be heard upon its claim against the Conemaugh for one-half of the damages to her cargo which the New York was compelled to pay, and which the Conemaugh, under the law and practice, should bear and pay.

Wherefore your petitioner prays that this honorable court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Seventh Circuit, to bring up this case to this honorable court for such proceedings as shall seem just.

Erie Railroad Comp
by James P. Sher
General Agen

B. Kremer

Johnson

Proctors for Petitioner.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

James P. Sherwin being duly sworn, deposes and says that he is the agent of the petitioner herein, the Erie Railroad Company; that said petitioner is a corporation; that deponent has read the foregoing petition; that the allegations therein contained are true, of his own knowledge, except as to the matters and things therein stated upon information and belief and as to those matters he believes it to be true, because he has been more or less familiar with the various steps taken in the litigation referred to in the said petition.

James P. Sherwin

Subscribed and sworn to before me this 11th day of October, A. D. 1905.

Walter M. Johnson
Notary Public

We hereby certify that we have examined the foregoing petition and in our opinion the petition is well founded and the case is one in which the prayer of the petition should be allowed.

D. J. Schuyler

J. W. Greenfield

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Brief in Support of Petition.

C. E. KREMER,
W. O. JOHNSON,
Proctors for Petitioner.

GEO. HORNSTEIN CO., PRINTERS, CHICAGO

IN THE

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In the matter of the petition of the Erie Railroad Company for a writ of certiorari, directed to the Circuit Court of Appeals for the Seventh Circuit to bring before the Supreme Court the case of the Erie Railroad Company vs. the Propeller Conemaugh, Erie & Western Transportation Company, claimant.

BRIEF FOR PETITIONER.

This case arises out of a collision between the Steamer Conemaugh and the Propeller New York, decided by this court.

The New York, 175 U. S., 187.

The court held both steamers at fault and decided that the New York must pay the damages sustained by the owners and insurers of the Conemaugh's cargo.

The case again came before the court upon an order to show cause, directed to the judge of the District Court, who entered a decree under the mandate.

Ex parte Union Steamboat Co., 178 U. S., 317.

In this decision the court held that the question of recoupment not having been decided by it at the former hearing, could not be brought to the attention of this court by a

petition for a writ of mandamus, but must go, if the party feels itself aggrieved, by appeal to the United States Circuit Court of Appeals. Thereupon the Circuit Court of Appeals heard the case on appeal, and decided that the question of the right of the New York to recoup one-half of the cargo damages against the Conemaugh was not at issue before it, because the pleadings praying such recoupment had not been filed, and also holding that the right to recover the moiety of the cargo damage could be made the subject of an independent separate suit. The owner of the New York thereupon petitioned for a writ of certiorari, which was granted, and this court again heard the case,

The U. S. Co. v. *E. & W. T. Co.*, 189 U. S., 363,

and again held affirming the decision of the Circuit Court of Appeals as we construe it, *that the owners of the New York had a right, by an independent suit, to recover the moiety of the cargo damage of the Conemaugh or her owners.*

Thereupon a libel was filed in the United States District Court for the Northern District of Illinois by the Erie Railroad Company, owner of the Propeller New York, against the Steamer Conemaugh to recover from it the sum of $19,734.61 with interest, this being one-half of the damages paid by the owner of the New York to the shippers and insurers of the cargo of the Conemaugh.

The District Court entered a decree for the libelant which the Circuit Court of Appeals for the Seventh Circuit Court reversed; holding that there was jurisdiction in admiralty of a libel for contribution, but that the question of whether there should be contribution or not was *res adjudicata* by virtue of the decisions of this court, above referred to.

We contend that the Circuit Court of Appeals misconstrued the decisions of this court in that regard, and that the

right of the New York to recover contribution by separate and independent suit has not been decided by this court or the Circuit Court of Appeals for the Sixth Circuit.

BRIEF AND ARGUMENT.

The Court of Appeals, we believe, has misconstrued the prior opinions of this court in this case. It holds as follows:

> "The prior proceedings in admiralty, averred in the present libel, were of the character contemplated by the rule for ascertaining, dividing and charging the liability between all the parties in interest. The damages suffered by the steamers respectively and the damage to the cargo of the Conemaugh were assessed, and while aggregate damages to both steamers were properly equalized, the decree charges the cargo damage against the New York alone. Equal division as well of this cargo damage was strenuously sought on behalf of the New York in the final hearing before the trial court, and in both reviewing tribunals upon the same argument and citations which are urged upon this appeal, but such relief was denied. Like contention is renewed here for independent relief upon averment that the burden of cargo damage was thus imposed for want of pleading in the case, setting up the claim by way of recoupment. Be this as it may, the fact remains that the decree passed touching all interests with all damage apportioned as stated. In other words, the respective rights and liabilities of the parties arising out of the collision were thus adjudicated in admiralty with all the parties before the court and all issues heard as raised by them respectively. These conclusions thereupon are unmistakably expressed in the opinions and carried out in the final decree. * * *

> The adjudication of liability arises out of the collision and apportionment thereof which thus appear in, as we believe, the proceeding in admiralty contemplated by the rule (as defined in the *North Star supra* and *Chattahooche supra*) for all cases of maritime collision. It is unquestionably *res adjudicata* upon all matters involved in that contest. * * * We are of opinion that such adjudication leaves no issue open in the admiralty between these parties arising out of the collision; that jurisdiction therein cannot be exercised to enforce equalization of the burden imposed upon one and the other party in the former decree in contravention of its express terms."

The court, therefore, has construed the opinions of this court *as absolutely foreclosing the right of the owner of the New York to recover in admiralty any part of the amount which it paid to the owners of the cargo of the Conemaugh.* The court does not say that the owners of the New York are not entitled to recover the moiety of damages from the Conemaugh, or that this court held that there was no such right.

It simply denies the libelant the right to recover herein through a misconception of what this court had to decide and did decide.

The effect of the decision of the Circuit Court of Appeals is, to deprive the owners of the New York of a clear right to compel the Conemaugh, to share with it the cargo loss arising out of the collision, which this court found and held to have been due to the joint fault of both vessels.

That each of two vessels held jointly at fault should equally bear the damage resulting from such negligence, has been frequently decided and is a rule of damages in admiralty settled beyond all question.

Schooner Catherine v. *Dickinson*, 17 How., 170.
North Star, 106 U. S., 17.

Manitoba, 122 U. S., 97.
The Albert Dumois, 177 U. S., 240.

There is nothing in this case in the way of a limitation of liability under the statutes that is pleaded to take away or limit the rule.

Prior to the decision of the District Court for the Eastern District of Michigan, when it entered a decree on the first mandate in the original case, there was no decided case, and no established practice, that required the filing of a cross libel or petition praying for recoupment, setoff or contribution.

On the contrary in all of the following cases recoupment was allowed without such pleadings.

The Eleonora, 17 Blatch., 88.
Leonard v. *Whitwell*, 10 Ben., 638.
The C. H. Foster, 1 Fed. Rep., 733.
Atlantic M. Ins. Co. v. *Alexandre*, 10 Fed. Rep., 279.
The Canima, 17 Fed. Rep., 271.
The Hercules, 20 Fed. Rep., 305.
The Job T. Wilson, 84 Fed. Rep., 149.
The Livingstone, 104 Fed. Rep., 918.
Albert Dumois, 177 U. S., 240.
Manitoba, 122 U. S., 97.

In fact there is an unbroken line of authorities to support the proposition that additional pleadings, besides libel and answer, were not necessary to enable a Court of Admiralty to properly apportion the damages between wrongdoers, when these were the libelant and defendant then before the court.

The District Court, however, held in this case that it could not be done without a cross libel or petition—the Cir-

cuit Court of Appeals for the Sixth Circuit sustained the District Court in this, but said (108 Fed. Rep., 107):

> "The appellants, not being obliged to assert their cross demand or claim for contribution by way of recoupment in this cause, did not do so. This leaves them free to assert their claim for contribution in an independent proceeding against the Conemaugh. No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied."

The Court of Appeals denied the motion to amend the pleadings, because the question of recoupment could be raised by the owner of the New York in an independent proceeding against the Conemaugh, in which it could assert its claim for contribution.

Had it thought otherwise it is fair to assume it would have granted the motion to amend the pleadings in that court, or would have remanded the case with leave to the owners of the New York to do so.

An appeal in admiralty entitles the appellant to a trial *de novo*.

Gilchrist v. *Chicago Ins. Co.*, 104 Fed. Rep., 566.

It is almost needless to say that the Court of Appeals did not consider that its decision settled and ended the question of the apportionment of the damages, or passed upon the question of whether there should be contribution or not.

Proctors for the Conemaugh even when the case was before this court again on the second writ of *certiorari*, being Case No. 97, admitted in their brief in that case, that these parties had a right to an independent action, for they say in their brief, at page 11:

> "So far as recoupment is a right and obtains, it is a definite right, subject to proper limitations. A party is

not compelled to resort to it; it is optional whether he assert the right in the original suit. Where in case of collision one vessel is libeled, it is optional with the owner of the other vessel to file counter claim by way of cross libel or to bring an independent action. This was determined by this court in *The Juniata*, 93 U. S., 337, and followed in the present case, 175 U. S., 187."

Neither court nor counsel up to this point in this litigation, viz., after the court's decision in the original case, 175 U. S., 187, and on the petition for a writ of mandamus, 178 U. S., 317, supposed that the question of recoupment was *res adjudicata*.

The Court of Appeals for the 6th Circuit holds so in almost so many words. It would not, in the exercise of that broad and liberal jurisdiction in admiralty cases have denied the motion to amend the pleadings, and thereby deprive the New York of the well established right to offset or recoup, if it had thought there was no independent right of action.

Up to this point neither this court nor the Circuit Court of Appeals held that the question of contribution was *res adjudicata*. We are therefore compelled to look for it in this court's last decision, viz.:

U. S. Co. v. *E. & W. T. Co.*, 189 U. S., 363.

It is all there is left.

The language of this case quoted by the Court of Appeals, that is supposed to be so fatal in its effect, and so destructive of what up to this time was considered by the Court of Appeals for the Sixth Circuit as a clear right to proceed by independent suit is as follows:

"The decree against it, the New York, now seeks to shift in part to the owners of the Conemaugh. Indeed, not to shift it, but virtually to vacate it and put the claims of the cargo owners into controversy with

> the Conemaugh. This, we think, should not be done."

In conclusion the Court of Appeals comments upon this language as follows:

> "The present decree in effect not only accomplished the modification of the former decree, *which was thus refused by both appellate tribunals,* but bars contest of liability on the part of the Conemaugh to the cargo owners. Surely if the appellate jurisdiction is inadequate for such object, it is not within the co-ordinate jurisdiction of another court sitting in admiralty, to grant relief from the terms of the prior decree or to re-open the controversy."

The court is clearly in error when it says that the decree of the District Court in this case now *modifies the former decree and bars the contest of liability on the part of the Conemaugh to the cargo owners.* This is an error because the answer of the Conemaugh sets out all her defenses, including the clauses in her bill of lading. All these defenses were considered and passed upon by the District Court here, and were again urged before the Circuit Court of Appeals in this case.

The owner of the Conemaugh *has not lost* any of its rights, and can and has in this proceeding urged all the defenses, which it claimed it could not do if recoupment was allowed without pleadings.

With all its rights preserved the Conemaugh cannot complain of the proceedings in the present case; every opportunity is given to put forth all her defenses. As the Court of Appeals for the Sixth Circuit said, referring to an independent proceeding by the New York:

> "No special equity appearing, this will be no injustice."

The Court of Appeals has given the following words of this court (189 U. S., 363) too much weight, referring to the attempt to recoup cargo damage against the Conemaugh: "This should not be done." The succeeding words of the opinion, however, are not quoted and they are:

> "The cargo owners' judgments were affirmed by this court, as we have seen, and they are none the less entitled to them under the circumstances of this record, although as to some of them they were represented by the Conemaugh. The New York, having been in fault, was responsible to the cargo, *and if, as between her and the Conemaugh, she have a claim for recoupment, the way is open to recover it.*"

The court construed the words "and if as between her and the Conemaugh, she have a claim for recoupment, the way *is open* to recover it," as if it read the way *was not open* to recover it. This court said that the way *was open*, and not that it had been closed, or that *it had been* open and was open no longer.

Can there be any doubt what this court meant or intended to convey by these words, in the light of what the Court of Appeals had said, viz., page 106:

> "The right of setoff or counter claim or recoupment being in no way presented by any pleading in the case, was not so involved in the nature of the decree rendered as to make it error if the matter was passed *sub silentio*. It was not a defense which the appellant was obliged to then present. *The mere fact that there are cross demands will not operate as an estoppel, if, in fact, the cross demand was not presented and adjudicated.*"

And on page 107:

> "The appellants, not being obliged to assert their

> cross demand or claim for contribution by way of recoupment in this cause, did not do so. *This leaves them free to assert their claim for contribution in an independent proceeding against the Conemaugh.* No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied."

This court, therefore, when it said "*the way is open to recover it,*" affirmed what was said by the Circuit Court of Appeals, as much in this as in its conclusion, that the decree was in conformity with the mandate issued upon the decision in 175 U. S., 187.

And Judge Kohlsaat, in his opinion as to this, says (see record):

> "It cannot be that the court meant to decide that the libelant herein should be denied the right to save its rights under the statute of limitations by amendment *and be remitted to a barren attempt to assert them in a separate proceeding which would be barred by the statute.*"

It is apparent that the district judge too, construed the language of this court, "*that the way is open,*" as entitling the New York to file its libel to recover what it could not recoup because no pleadings demanding it had been filed in the former suit.

The Court of Appeals now say this language of this court means that THE WAY IS NOT OPEN, *or that the way was once open, but now was open no longer*, and barred forever.

The Court of Appeals denies the right to file this libel, because they say this court has so decided and held:

> That this claim now urged has been adjudicated.
> That the New York has had her day in court.

That she cannot be heard again.

That the questions urged are *res adjudicata*, and all this in the face of this words of the court, *"if as between her (New York) and the Conemaugh she have a claim for recoupment, the way is open to recover it."*

We certainly supposed we were pursuing that way.

The court has decided here that a Court of Admiralty has jurisdiction of a libel for contribution. There is therefore but one question now to be settled, viz.: Has this court, in its opinions, foreclosed libelant's right to recover contribution?

In our judgment it has not, and the decision of the Court of Appeals should be reversed.

The questions between the New York and Conemaugh, for contribution, were never passed upon by this court, or any other. They could only arise under the doctrine of recoupment. This court expressly decides that on the original hearing this question was not raised, argued or decided. (*New York*, 178 U. S., 317.) This court again decided that the New York could not be heard because of the absence of the necessary pleadings, *and therefore the New York as against the Conemaugh on the question of contribution has never had its day in court*, and the questions are, therefore, not finally disposed of between these parties, and the rule of *res adjudicata* does therefore not apply.

The authorities upon what is *res adjudicata* are as follows:

Van Fleet on Former Adjudications, Sec. 256, says:

"Unless the defendants contest an issue with each other, either upon the pleadings between them and the plaintiff, or upon cross pleadings between themselves, it will not be *res adjudicata* in a litigation between

them. * * * A judgment against them, if there are no issues between them, does not bind them as to each other."

Citing *State Bank of St. Louis* v. *Bartlett*, 114 Mo., 276.

O'Connor v. *New York Land Co.*, 28 N. Y., 544.

In *Bulkley* v. *House*, 21 L. R. A., 247, the court said:

"A judgment against several defendants is not conclusive as between themselves in respect to their rights and liabilities toward each other."

In the case of *State Bank of St. Louis* v. *Bartlett*, the court said:

"The rule is that, when the parties to a suit were not adversaries under the pleadings, the judgment against them does not conclude either, so as to prevent him from showing in a contest between themselves that the obligations should be borne by the other."

In the case of *Koelsh* v. *Mixer*, 53 Ohio St., 207, an action was brought by a surety on a bond against his cosurety for contribution. Defendant plead a former adjudication in a case in which plaintiff and defendant had been parties defendant, and that defendant was released from liability. The Supreme Court would not allow the plea, saying:

"Whilst the exact limits of the doctrine of *res adjudicata* in its application to some cases are not definitely settled, it is accepted as generally true that the judgment relied on for that effect in subsequent litigation must have been pronounced on the same issues, between the same parties, or their privies, standing in adversary character to one another.

"*It is not enough that an issue may have been*

joined between the obligee and the defendant, as to the liability of the latter on the bond. Whatever that issue may have been, it was not in issue between himself and his co-defendant, the plaintiff in this action, and could not, therefore, conclude the latter; though parties to the suit they were not such in an adversary character, being simply co-defendants to the suit on the bond. * * *

"It is the general rule that parties to a judgment are not bound by it, in a subsequent controversy between each other, unless they are adversary parties in the original action."

The opinion in this case contains citations to many pertinent authorities.

In this case as to the cargo damage the Conemaugh and New York were only co-defendants.

The law applicable to the present state of facts is correctly stated in the case of:

Cottingham v. *Earl of Shrewsbury*, 3 Hare, 27.

"If a plaintiff can not get at his right without trying and deciding a case between co-defendants, the court will try and decide that case and the co-defendants will be bound. But if the relief given to the plaintiffs does not require or involve a decision of any case between the co-defendants, the co-defendants will not be bound as between each other by any proceedings which may be necessary only to the decree the plaintiff obtains."

McCall v. *Carpenter*, 18 Ohio, 297.

Packet Co. v. *Sickles*, 5 Wall., 580.

In the latter case the court (at page 592) says:

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied

on by way of evidence as conclusive, *per se*, it must appear, *by the record of the prior suit*, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the intrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

In *Cromwell* v. *County of Sac*, 94 U. S., 353, it was held:

"In all cases, therefore, where it is sought to apply estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be *as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined.*"

In *Last Chance Mining Co.* v. *Tyler Co.*, 157 U. S., 683, it was held:

"A former judgment on a different matter of dispute between the same parties is conclusive only as to matters decided and *not as to other matters that might have been decided.*"

In Amer. & Eng. Ency. of Law, 1st Ed., Vol. 21, p. 200, the rule supported by many adjudications is thus laid down:

"It is not only necessary that every issue should be directly adjudicated upon in order to subject it to the doctrine of *res adjudicata*, but such issues must be definite, clear and certain. No degree of probability will be sufficient. Absence of doubt and presence of certainty is of vital importance."

The rule in the Ohio courts is the same.

In *Love* v. *Trueman*, 10 Ohio St., 45, it was said:

"Where a judgment or decree is relied on by way of evidence as conclusive *per se* between the parties to a subsequent suit, it must appear by the record of the former suit that the particular controversy sought to be precluded was therein necessarily tried and determined."

In *Porter* v. *Wagner*, 36 Ohio St., 471, it was held that:

"Where a judgment is relied on as an estoppel, the question *is not what the court might have decided in a former action, but what in fact it did decide, as shown by the judgment.*

"A judgment is conclusive by way of estoppel only as to facts, without the proof or the admission of which it would not have been rendered."

Can it then be said that the courts denied the conceded right of the New York to claim contribution, and turned her owner out of court to pursue a remedy which did not exist? A remedy which the respondent now says did exist in the former case and was passed upon and denied and therefore cannot be asked again.

This court never intended to cut off the New York's right to be heard to demand contribution in an independent proceeding in which the Conemaugh could interpose her defenses.

Our conclusions are:

1. That admiralty has jurisdiction in case of a libel f contribution was held by the Court of Appeals.

2. That the question of contribution between the N York and Conemaugh was not determined in any prior case by this court, because not presented by proper pleadings.

3. That the right of the New York to proceed by independent and separate suit was by the decisions of this court conceded and not foreclosed.

4. That upon this question the decisions of this court were and are not *res adjudicata*.

5. That therefore the owners of the New York had a right to file this libel for contribution against the Conemaugh to enforce a legal as well as an equitable claim, founded in this case upon a clear and well established rule of property.

We therefore pray that the court may grant the writ of *certiorari* so that the owner of the New York may be heard here and the controversy between the New York and Conemaugh finally determined.

Respectfully submitted.

C. E. KREMER,
W. O. JOHNSON,
Proctors for Petitioners.

Chicago, October, 1905.